

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
88365-g76H BY BITTERROOT NATIVE)
GROWERS INC.)

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on July 26, 1994. Objector Clair Griffin filed timely exceptions to the Proposal for Decision but did not request an oral argument hearing. The Department received Applicant's response to those exceptions August 25, 1994.

The Proposal recommended granting Beneficial Water Use Permit 88365-g76H to Bitterroot Native Growers, Inc. to appropriate 75 gallons per minute up to 7.20 acre-feet per year by means of a well located at a point in Lot 33, Block 7 of the Emma Johnson Addition to Corvallis, generally located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, Township 07 North, Range 20 West, Ravalli County, for irrigation of 1.70 acres located in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 33. The Proposal recommended that only 1.70 acres could be irrigated at any given time, but the 1.70 acres could be relocated within the seven acre parcel located within the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33. The period of diversion would be from March 15 to November 1, inclusive of each year.

For this review, the Department must accept the Proposal's findings if the findings are based upon competent substantial evidence. The Department may modify the conclusions of law if it disagrees with the Proposal for Decision. Mont. Code Ann. § 2-4-

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621(3) (1993) and Mont. Admin. R. 36.12.229 (1994). The Department has considered the exceptions and reviewed the record under these standards and the Department finds that the Proposal for Decision is supported by the record and properly applied the law to the facts.

The Objector's exceptions suggest several modifications and additions to the Proposal for Decision culminating in a request that Applicant be required to use an alternate source of water whenever possible. In each case, the suggested modifications are either not supported by the record, the excepted to finding is supported by the record, or the exception is not relevant to the ultimate conclusion that Applicant has proven the necessary criteria for issuance of this permit. The alternate source idea was discussed by Conclusion of Law No. 11 in the Proposal for Decision and needs no further discussion here.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision for this Final Order. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 88365-g76H is granted to Bitterroot Native Growers, Inc. to appropriate 75 gallons per minute up to 7.20 acre-feet per year by means of a

well located at a point in Lot 33, Block 7 of the Emma Johnson Addition to Corvallis, generally located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, Township 07 North, Range 20 West, Ravalli County, for irrigation of 1.70 acres located in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 33. Only 1.70 acres may be irrigated at any given time, but the 1.70 acres may be relocated within the seven acre parcel located within the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33. The period of diversion shall be from March 15 to November 1, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. This permit is subject to Mont. Code Ann. § 85-2-505, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

The final completion of the well must include an access port of at least .50 inch so that the static level of the well may be accurately measured.

C. The appropriator shall install an adequate flow and volumetric metering device on each well. The appropriator shall measure: 1) a quarterly pumping flow rate; 2) the quarterly volume of water used; and 3) the static water level. These three items shall be measured once during each of the following time

periods: 1) March 15 through 31; 2) June 15 through 30; 3) September 15 through 30; and 4) December 15 through 31. Records must include the water level, a pumping flow rate in gallons per minute, number of gallons used since the last measurement, method of measurement, date and time of measurement, and description of the measuring point on the casing. The measurements shall be recorded only at a time when the water level is static, or there is no significant change in measurements taken 1 to 2 minutes apart. The appropriator shall submit the records to the Missoula Water Resources Regional Office, PO Box 5004, Missoula, MT 59806 upon request or by November 30 of each year.

D. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

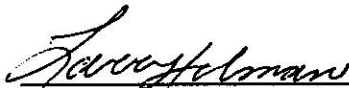
E. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 22nd day of September, 1994.



Larry Holman, Chief
Water Rights Bureau
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6631

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 22nd day of September, 1994 as follows:

Bitterroot Native Growers Inc.
% Pat Burke
445 Quast Ln
Corvallis, MT 59828

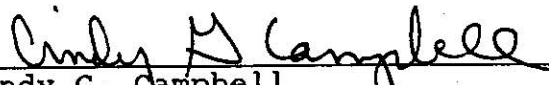
Clair Griffin
1380 Holloron Rd
Corvallis, MT 59828

Curt Martin, Manager
Missoula Water Resources
Regional Office
1610 South 3rd St. West,
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P.O. Box 5004
Missoula, MT 59806

W.G. Gilbert, III
P.O. Box 345
Dillon, MT 59725-0345

Philip F. Walsh
Lineberger, Walsh & McKenna PC
P.O. Box 6400
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Vivian A. Lighthizer
Hearing Examiner
Department of Natural
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1520 E 6th Ave.
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Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
88365-g76H BY BITTERROOT NATIVE)
GROWERS INC.)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on June 7, 1994, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted to Bitterroot Native Growers (Applicant or BNG) for Application 88365-g76H under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicant appeared at the hearing by and through counsel, Philip F. Walsh.

Patrick Burke, President of BNG, appeared at the hearing as a witness for Applicant.

Ross Miller, Hydrogeologist and principle of Land & Water Consulting, Inc., appeared at the hearing as a witness for Applicant.

Objector Clair Griffin appeared at the hearing in person and by and through counsel, W. G. Gilbert, III and Tonya Baumbarger.

Ken Reeder and Leona Scanland, well owners in the area, appeared at the hearing as witnesses for Objector.

Gary Evans, owner of Bitterroot Research, appeared at the hearing as a witness for the Objector.

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Curt Martin, Regional Manager, and Wes McAlpin, Water Right Specialist with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing but did not testify.

EXHIBITS

Applicant offered four exhibits for the record. All were accepted without objection.

Applicant's Exhibit 1 is a linear drawing of the proposed distribution system with the roadways shown in yellow, the main waterline and risers shown in orange, and the hand lines shown in blue.

Applicant's Exhibit 2 consists of two pages and is the *curriculum vitae* of Ross Miller.

Applicant's Exhibit 3 is a bound report entitled *Hydrogeologic Investigation, Bitterroot Native Growers, Inc., Corvallis, Montana*, prepared by Land and Water Consulting, Inc.

Applicant's Exhibit 4 is a USGS quadrangle map dated 1967, entitled Corvallis, Mont. The map has been enhanced to show Applicant's proposed well location, Objector's well location, the location of the Agriculture Experiment Station's (AES) well, and the distances from Applicant's proposed well to Objector's well and the AES well. This map has been mounted on a foam board measuring 22 inches by 27 inches.

Objector offered five exhibits for the record; all except Objector's Exhibit C were accepted into the record without objection. Applicant objected to this exhibit based on the

belief that the owner of the well should have objected and the lessee should not be presenting this exhibit, that only the owner should present this evidence. The objection was overruled during the hearing and the exhibit was accepted into the record. There is no statute or rule to prohibit a lessee from presenting evidence concerning his interests in leased property.

Objector's Exhibit A is a USGS quadrangle map dated 1967, entitled Corvallis, Mont. This map has a circle drawn on it in black ink which encompasses a one and one-half mile radius from Applicant's well. There are numbered red dots placed inside the circle which purportedly indicate the location of wells according to the well logs submitted for these wells. There is one large green dot in the center. Two red dots numbered 54 and 55 purportedly represent the location of Applicant's wells; however, the well numbered 54 is not even on property owned by Applicant which makes the accuracy of this exhibit suspect. An area in yellow indicates too many wells to represent by red dots. Pink x's were added during the hearing by Objector showing the location of other wells. Two smaller circles were added in pencil during the hearing by Gary Evans, who prepared the exhibit, showing a half mile radius and a mile radius from Applicant's proposed well.

Objector's Exhibit B consists of 19 pages of Department's place of use listing and the cover page which is a copy of the pertinent portion of Objector's Exhibit A and is a reference for the red numbered dots on Objector's Exhibit A and the owners of

the wells. The red dots are identified by red numbers written in beside the corresponding legal land description.¹

Objector's Exhibit C is a copy of a Declaration of Vested Groundwater Rights signed by Elizabeth Flint on June 17, 1963 and filed with the clerk and recorder.

Objector's Exhibit D is a copy of a Notice of Completion of Groundwater Appropriation by Means of Well filed with the clerk and recorder on March 22, 1972, for a well owned by Henry or Evelyn Griffin.

Objector's Exhibit E is a copy of a well log for the deepening in 1974 of the well represented in Objector's Exhibit D.

The Department file was made available for review by all parties who expressed no objection to any part of it; therefore, the Department file is accepted into the record in its entirety.

PRELIMINARY MATTERS

Immediately prior to the hearing, Objector through his counsel filed a Motion to Dismiss for the reason that the Department failed to give proper notice of these proceedings to

¹Objector's Exhibits A and B were compiled using a printout generated by the Department identifying the places of use of the various water rights. It puzzles the Hearing Examiner that Mr. Evans used the place of use index which identifies only the place of use. Actually the only information gained from these exhibits are the places of use for these water rights, not the location of the wells, although it is true that many of the places of use for wells are the points of diversion, that is not necessarily true for all wells. In some instances, the well could be in a completely different land description than the place of use. A point of diversion index would have been more accurate or as accurate as one could be using well logs which are notoriously erroneous concerning land descriptions.

owners of surrounding wells and in particular to Elizabeth Flint, Kenneth Reeder, and Leona Scanland.

Mont. Admin. R. 36.12.213 (1994) states in relevant part,

Any application to the hearing examiner for an order shall be by motion which, unless made during a hearing, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. Written motions or responses to motions shall first be served on all parties, and then filed with the hearing examiner with a certificate of service attached. A written motion shall give notice to other parties that should they wish to contest the motion they must file a written response with the hearing examiner (after first serving all parties), and that the written response, with a certificate of service attached, must be filed within 10 days after service of the motion. . . .

This motion was served on Applicant by facsimile transmission at 11:30 p.m. the night before the hearing, was not seen by Applicant's counsel until the morning of the hearing and was therefore untimely and must be DENIED.

However, the issue of proper notice must be discussed. A review of the record in this matter indicates that the application was properly noticed. The public notice was published in a newspaper of general circulation in the area of the source and individual notices were mailed by first-class mail to appropriators of groundwater or an applicant for or holder of a permit who, according to the records of the Department, may be affected by the proposed appropriation, as required by Mont. Code Ann. § 85-2-307(1) (1993). Such appropriators are the only water users for whom individual notice is required. The Department is not required to give notice to all water users in the entire area if Department records do not provide reason to believe that the

effects of the proposed project will extend that far. In the instant case Dr. Marshall Corbett, Hydrologist with the Department, recommended a one-half mile radius notice area from Applicant's proposed well.

Of the persons listed in the Motion to Dismiss, no water right could be found in the Department's records for Elizabeth Flint or Kenneth Reeder nor were these wells identified on Objector's Exhibit B. These names do appear on the unidentified list (it appears to be a Montana Bureau of Mines and Geology listing) attached to the Motion to Dismiss. There are several water rights listed in the Department's records for Leona Scanland; all of which are outside the half mile radius.

If a well owner did not file a Notice of Completion of Groundwater Development with the Department for a well completed after July 1, 1973¹, that person does not have a water right for that well and therefore is not listed in the Department's records. If a person did not file a claim for an existing right for a well completed before July 1, 1973, during the adjudication filing period, or later file a Form 608B for an exempt well or Form 627, Notice of Water Right for an exempt well, that well is not a part of the Department's record which, according to Mont. Code Ann. § 85-2-307 (1)(b)(i) (1993), is the source the

¹A person who drilled a well and appropriated ground water after January 1, 1962 was required to file a Notice of Completion of Groundwater by Means of a Well with the county clerk and recorder to obtain a water right. If the owner of such a well did not file a notice of completion at that time, there is no water right and a Notice of Completion of Groundwater Development must now be filed with the Department.

Department must use to make the determination of which water users would be sent individual notices. If those persons wish to receive notices of proposed appropriations, they should visit the Department's Missoula Water Resources Regional Office to determine the correct form to file.

Applicant moved to have Objector's witnesses excluded from testifying on the basis that he had not been informed, before the hearing, who the witnesses were and was therefore not prepared to cross-examine them. The motion was denied with the provision that Applicant be given the opportunity to rebut the testimony of any of those witnesses in writing if he felt it was necessary after the hearing. Applicant then declared a standing objection to the testimony of any of Objector's witnesses. The content of the witnesses testimony was such that Applicant was able to cross-examine them during the hearing and felt no need to present a written rebuttal. Applicant's objection is overruled.

Applicant objected to Objector's testimony concerning the property he leases from Elizabeth Flint stating the owner did not object to the proposed well and that Objector's testimony concerning that property is irrelevant and shouldn't be considered. There is no statute or rule that limits the right to object to a proposed appropriation to the owners of property. A person has standing to file an objection if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation. Mont. Code Ann. § 85-2-308(3) (1993). A lessee certainly has interests in the leased property

and is therefore allowed to testify how those interests may be affected by the proposed project. Applicant's objection is overruled.

The public and individual notices for the instant application indicated the water would be appropriated at a rate of 100 gallons per minute. After the objection was received, in an attempt to settle the objection, Applicant proposed to reduce the proposed rate of diversion to 50 gallons per minute. However, since the negotiations were unsuccessful, Applicant proposed at the hearing to appropriate at a rate of 75 gallons per minute.

An application for beneficial water use permit may only be altered after public notice of the application if the changes would not prejudice anyone, party or non-party, i.e., those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. See In re Applications W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an instream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the

burden, such as a reduction in the place of use. See In re Application 50272-g42M by Joseph F. Crisafulli. The instant application was noticed at 100 gallons per minute; therefore, a change in the flow rate would not cause prejudice to anyone, party or nonparty, since the flow rate was reduced to 75 gallons per minute from the published flow rate of 100 gallons per minute.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-302 (1993) states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Applicant duly filed Application 88365-g76H with the Department on November 26, 1993, at 10:50 a.m. (Department file.)

3. Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source, on March 2, 1994. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. One

timely objection was received and Applicant was notified of that objection by a letter from the Department dated April 1, 1994. (Department file.)

4. Applicant seeks to appropriate 75 gallons per minute up to 7.20 acre-feet per year by means of a well located at a point in Lot 33, Block 7 of the Emma Johnson Addition to Corvallis, generally located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, Township 07 North, Range 20 West, Ravalli County,¹ for irrigation of 1.70 acres located in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 33. Although only 1.70 acres would be irrigated at any given time, the 1.70 acres may be relocated within the seven acre parcel located within the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33. The proposed period of diversion would be from March 15 to November 1, inclusive of each year. (Department file and testimony of Patrick Burke.)

5. BNG is an ecological restoration company. Its employees perform planning and consulting services in terms of large scale reclamation and restoration projects. They grow plant materials native to areas throughout the western United States to reclaim damaged sites. It has field crews that go to the sites and do the actual restoration. It offers a comprehensive restoration service. Its clients are most of the major mining companies in the West as well as state and federal agencies. In addition to reclamation of mined areas, it completes such projects as pipeline restoration, wildlife habitat improvement areas for

¹Unless otherwise stated, all land descriptions in this Proposal are located in Township 07 North, Range 20 West, Ravalli County.

state and federal agencies, restoration of impacted sites in the national parks, and restoration of threatened endangered species habitat to name a few. (Testimony of Patrick Burke.)

6. BNG has two other wells on its property. One was in place when BNG purchased the property in 1986. That well produces 20 gallons per minute and supplies the needs of the office complex and one small propagation house. The second well was drilled in 1990 to a depth of 156 feet. It produces 68 gallons per minute and is the major source of water for five shade houses, the five gallon production area, and this spring was also used to supply the large container area which would be supplied by the proposed well. All wells are connected in a manifold system as a precaution against the failure of one of the pumps. However, the only time a well would be turned into another area would be at the failure of a pump and this has occurred only two or three times since 1986. Each well has a filtration system in place to filter out sand.

7. The proposed well was drilled in November of 1993 to a depth of 198 feet by a licensed driller/contractor. It has a six-inch casing and a 7.5 horsepower pump set at 190 feet. In actual operation, the pump would lift the water to two pressure tanks, each with a capacity of 120 gallons. From the tanks, the water would enter a three-inch mainline about 400 feet long that runs north and south. Risers in the mainline are used to supply hand lines that run east and west. There are eight heads in the hand lines at intervals of 20 feet. The system is designed to

deliver water as uniformly and precisely as possible with an overhead system to the containerized plants. It is specifically designed not to water the roadways. (Testimony of Patrick Burke and Applicant's Exhibit 1.)

8. At the present time, Applicant is using its surface water right of 17 miner's inches to water the area to be served by the new well. This is not an ideal situation since the surface water quality in the irrigation ditch is variable. It contains weed seeds; there are problems with the pH (acidity and alkalinity); and the runoff from some of the upditch fields may contain herbicides which could destroy all the plants in the large container area. A filtration system traps some of the weed seeds but it cannot improve the quality of the water or filter out herbicides. (Testimony of Patrick Burke.)

9. The relatively high flow rate requested, 44.12 gallons per minute per acre, is necessary since, in a nursery, it is important to deliver a lot of water quickly. It is much more efficient in terms of labor and it is better for the plants to water a large block of plants all at once, then shut the water off for several days. (Testimony of Patrick Burke.)

10. Applicant engaged Land and Water Consulting, Inc. to conduct a hydrological investigation of the groundwater system at BNG with specific regard to the siting of the proposed well and more specifically to determine the availability of water and to determine if the proposed well would impact other wells in the area.

A pump test was conducted from May 19 to May 24, 1994. Originally the plan was to pump 75 gallons per minute from BNG's well; however, the owner of the pump was worried that the pump might be damaged pumping at a rate of 75 gallons per minute for the entire weekend so the actual test was conducted while pumping 50 gallons per minute.

The water levels in the AES well were monitored for a period of approximately 19 hours prior to and four hours after the actual pump test. The new well was pumped at a rate of 50 gallons per minute for 77 hours, monitoring the water levels at the AES well located approximately .80 of a mile from the proposed well. During this pump test there was no change in the water level of the AES well. (Testimony of Ross Miller and Applicant's Exhibit 3.)

11. BNG's well is located at the edge of an upland terrace as it drops off. As the terrace drops off, there is the historic river system of the Bitterroot River where a great quantity of water is available. Therefore, there is a tremendous recharge to wells in that area from the Bitterroot River system. The source of recharge to Applicant's well is both from the Bitterroot River system and the upland terraces. Objector's well and AES's well are both located in the Quast Terrace Aquifer as are Leona Scanland's wells. (Applicant's Exhibit 3, Objector's Exhibit A, and testimony of Ross Miller and Leona Scanland.

12. The natural low water levels of the year in the area of the new well occur in April and May. The highest levels occur in

August and September. The well test, being conducted in the low water period, actually results in a worst case scenario.

(Applicant's Exhibit 3 and testimony of Ross Miller.)

13. Applicant owns the property where the water will be put to use. (Department file and testimony of Patrick Burke.)

14. There were no water rights listed in the Department records for Objector, Clair Griffin, until he filed two Notices of Water Right for exempt wells on March 16, 1994, for his two wells which were completed in 1908 and 1972. The 1972 well which produced 10 gallons per minute, failed in 1974 and had to be deepened which resulted in a higher flow rate than it had in 1972. Since a Notice of Completion of Groundwater Development was not filed for the additional five gallons per minute, Mr. Griffin needs to file such a notice of completion to have a water right for that amount. The well completed in 1908 has never given Objector any trouble, even though it is located very near the 1972 well. The reason the second well was completed in 1972, was the pump on the old well failed and Objector's father had to work all night to replace the pump so the cattle could have water. This event made the need for a back-up well evident. (Testimony of Clair Griffin.)

15. When the new well was drilled in 1972, it had a static water level of 25 feet. However, after pumping the well at 10 gallons per minute for three hours, the water level was drawn down to 145 feet. When the well failed in 1974, it was deepened 27 feet to a depth of 172 feet. The static water level was then

145 feet and after pumping at 15 gallons per minute, the water level dropped to 167 feet. (Department file, records, Objector's Exhibits D and E, and testimony of Objector.)

16. Mr. Griffin operates a dairy farm approximately 1.1 miles north and east of the proposed well. Objector's family has operated a dairy farm at its present site since 1949. The current dairy operation consists of milking approximately 150 Holstein dairy cows three times a day to produce milk commercially for a company in Bozeman, Montana. It is a family operation requiring five employees. The sources of water for this operation are the two aforementioned wells. Without the water from these wells, milk production would plummet. Water is also used in cleaning the milking facility. In the event of well failure during the summer, cattle could drink from the irrigation ditch. However, if the well failed in the winter, there would be no other water available at the home place. (Testimony of Clair Griffin.)

17. Objector leases a parcel of land adjacent to BNG and keeps stock there. That property is supplied by a well completed on June 10, 1923, which produces a flow rate of 40 gallons per minute. This property is utilized from October to May each year. Objector also leases some property located within one-half mile of Applicant's property. Water is supplied from the owner's domestic well to a stock fountain. Objector also has the use of a well located east of the Agriculture Experiment Station. (Testimony of Clair Griffin and Objector's Exhibits A and C.)

18. One of the basic principles for Mr. Griffin's objection is that Applicant has a surface water right from the Daly Ditch system that could supply the water needed instead of drilling another well. Mr. Griffin has used Daly Ditch water to irrigate his alfalfa, which he believes is a very sensitive crop, and he has never experienced any detrimental effects to his crop from the ditch water. (Testimony of Clair Griffin.)

19. Mr. Griffin is concerned about the subdivision being constructed in the area. His major concern is that for every new house, there is a new well. Mr. Griffin is very concerned about the dewatering of the aquifers especially since he is aware of at least two wells with problems. One well, identified as the Jenkins well, is located approximately a mile from the proposed well and approximately one-quarter mile west and north of the Griffin residence. The other well, identified as the Scanland well, is located approximately a mile and a quarter north and east of Applicant's proposed well. (Objector's Exhibit A and testimony of Clair Griffin and Leona Scanland.)

20. Leona and Glen Scanland have four wells ranging in depth from 121 feet to 190 feet. Three of the wells are production wells and the fourth is dry. The fourth was their domestic well which failed in 1988. They were unable to deepen the well and were required to drill a new well at an approximate cost of \$3500 to \$4500 with the added inconvenience of moving the pressure tanks and other equipment. The Scanlands were without water for approximately a month. At the time their well failed,

an apple orchard owner "below" them had just converted to a drip irrigation system. Mrs. Scanland fears the proposed well will cause problems with their wells. (Testimony of Leona Scanland.)

21. There are no unperfected permits in the proposed source and no reservations have been granted by the Board of Natural Resources and Conservation for the proposed source. (Department records and file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Preliminary Matters and Finding of Fact 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. Mont. Code Ann. Title 85, chapter 2 (1993). See Findings of Fact 1 and 2.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by a preponderance of evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993) are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the ap-

plicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use;

(g) the water quality of a prior appropriator will not be adversely affected;

(h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(i) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

. . .
(5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies.

4. An applicant is required to prove the criteria in subsections 85-2-311(1)(g) through (i) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the Department these criteria, as applicable, may not be met. For the criterion set forth in subsection 85-2-311(1)(h), only the Department of Health and Environmental Sciences or a local

water quality district established under Title 7, chapter 13, part 45, may file a valid objection. Mont. Code Ann. § 85-2-311(2) (1993). No valid objections relative to subsections 85-2-311(1)(g), (h), or (i) were filed for this application. Therefore, Applicant is not required to prove the criteria in subsections (1)(g), (h), or (i).

5. The proposed use, irrigation, is a beneficial use. Mont. Code Ann. § 85-2-102(2) (1993). The relatively high flow rate of 44.12 gallons per minute per acre is justified and the system is designed to prevent waste. Applicant will ultimately derive a monetary benefit from the use of the water in the manner proposed. See Findings of Fact 4, 5, 7, and 9.

6. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 6 and 7.

7. Applicant has proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed and that during the period Applicant seeks to appropriate, water is reasonably available in the amount Applicant seeks to appropriate. See Findings of Fact 10, 11, and 12.

8. Applicant has a possessory interest, or the written consent of the person who has the possessory interest, in the property where the water is to be put to beneficial use. See Finding of Fact 13.

9. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 21.

10. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator will not be adversely affected by the proposed appropriation. See Findings of Fact 10 and 11.

Although there are some examples of failed wells in the area, none of these well failures could be linked with Applicant's use of the water. Objector's well failed in 1974, before BNG's inception. Mrs. Scanland's well failed in 1988 when BNG's water use was 20 gallons per minute. Mr. Jenkins' well "sputters" during the low water period which leads one to believe the well should be deepened or the pump should be lowered. See Findings of Fact 14, 15, 19, and 20.

One can certainly understand Mr. Griffin's concern about water availability. If both his wells fail on the home place, there is no other source available for cleaning the facility and in the winter no other source for his dairy cows' needs. Even though he does have water available from his leased properties, water for these properties is also supplied by wells. See Findings of Fact 16, 17, and 19. However, the pump test proved conclusively there would be no effect, adverse or otherwise, to Mr. Griffin's wells. There was absolutely no change in the water level of the AES well during 77 hours of pumping Applicant's new

well. Since Mr. Griffin's wells are located farther from the new well than the AES well, there is very little likelihood of an adverse effect to those wells.

11. Objector's additional central objection is his contention that Applicant should not be allowed to appropriate water from the aquifer when he has an alternate water source from the Daly Ditch available. See Finding of Fact 18. However, a review of statutes and of case law provides no foundation for this argument. If an appropriator can make beneficial use of its intended appropriation without adversely affecting senior appropriators, and can meet the relevant criteria, that appropriator is not bound to use water from an alternate source. See In re Application 23106-s76M by Vasilchek (1981); In re Application 54911-g42M by Sackman (1985); In re Application G65713-76N by Fagan (1989); See generally Boyd v. Hoffine, 44 Mont. 306, 120 p. 228 (1911). In the instant case, the alternate source available for Applicant's use, is surface water that is not ideal for the situation. See Finding of Fact 8.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 88365-g76H is granted to Bitterroot Native Growers, Inc. to appropriate 75 gallons per minute up to 7.20 acre-feet per year by means of a well located at a point in Lot 33, Block 7 of the Emma Johnson

Addition to Corvallis, generally located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, Township 07 North, Range 20 West, Ravalli County, for irrigation of 1.70 acres located in the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 33. Only 1.70 acres may be irrigated at any given time, but the 1.70 acres may be relocated within the seven acre parcel located within the N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33. The period of diversion shall be from March 15 to November 1, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. This permit is subject to Mont. Code Ann. § 85-2-505, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

The final completion of the well must include an access port of at least .50 inch so that the static level of the well may be accurately measured.

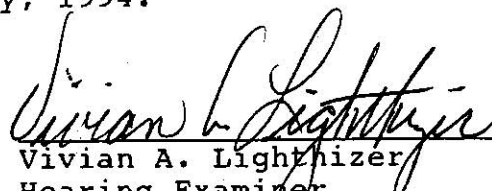
C. The appropriator shall install an adequate flow and volumetric metering device on each well. The appropriator shall measure: 1) a quarterly pumping flow rate; 2) the quarterly volume of water used; and 3) the static water level. These three items shall be measured once during each of the following time periods: 1) March 15 through 31; 2) June 15 through 30; 3)

September 15 through 30; and 4) December 15 through 31. Records must include the water level, a pumping flow rate in gallons per minute, number of gallons used since the last measurement, method of measurement, date and time of measurement, and description of the measuring point on the casing. The measurements shall be recorded only at a time when the water level is static, or there is no significant change in measurements taken 1 to 2 minutes apart. The appropriator shall submit the records to the Missoula Water Resources Regional Office, PO Box 5004, Missoula, MT 59806 upon request or by November 30 of each year.

D. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

E. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

Dated this 26th day of July, 1994.


Vivian A. Lighthizer
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6615

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 26th day of July 1994, as follows:

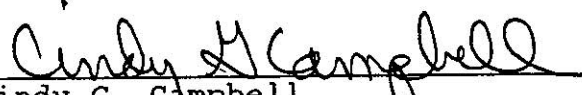
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